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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. PATRICK SCOTT RYAN, Defendant and Appellant.	C079466 (Super. Ct. No. 09F5553)

Over the span of several years, defendant Patrick Scott Ryan was charged with multiple felony and misdemeanor offenses in numerous cases. He entered into a plea agreement in which he was sentenced for two of those cases--a first degree burglary conviction in case No. 09F5553 (Pen. Code, § 459; unless otherwise set forth, statutory references that follow are to the Penal Code), and felony possession of a controlled substance in case No. 13F6889 (Health & Saf. Code, § 11350), and the remaining cases were dismissed. The court imposed the middle term of two years on the possession

offense, doubled to four years for an admitted prior strike, and a concurrent two-year term for the burglary offense.

After the court granted defendant's petition to reduce his felony drug possession conviction to a misdemeanor under Proposition 47 (§ 1170.18), the court resentenced defendant to a four-year term for the burglary and to time served on the misdemeanor possession. Defendant contends the court erred in resentencing him on the burglary conviction because the sentence was concurrent and did not fall within the purview of section 1170.18. He thus claims the court lacked jurisdiction to increase the sentence on that conviction. Finding no merit in his contentions, we affirm the judgment.

FACTS AND PROCEEDINGS

In December 2009, defendant pleaded no contest to one count of first degree burglary in case No. 09F5553 in Shasta County. (Pen. Code, § 459.) The court suspended imposition of sentence, and placed defendant on three years' probation.

In 2010, while on probation, defendant tested positive for drugs and was also convicted of second degree robbery in Oregon. He admitted the positive drug test and the out of state offense constituted probation violations in case No. 09F5553. In 2011, the court revoked probation in that case, imposed the middle term of four years for the burglary, suspended execution of the sentence and reinstated defendant on probation with additional terms.

Over the next few years, defendant was charged with various misdemeanor and felony charges in six additional Shasta County cases--case Nos. 13F6889, 13F1411, 13F2367, 13M50, 13M4100 and 14M2054. Defendant ultimately agreed to plead no contest in case No. 13F6889 to a felony violation of Health and Safety Code section 11350, subdivision (a), possession of a controlled substance, and admitted one strike conviction as well as a violation of probation in the prior burglary case in exchange for the dismissal of all other cases. The court sentenced defendant to the middle term of two

years for the possession conviction in case No. 13F6889, doubled under the Three Strikes Law for a total of four years, and to a concurrent two-year term on the burglary offense in case No. 09F5553.

Following the electorate's passage of Proposition 47, defendant filed a petition under section 1170.18 to reduce his felony drug possession conviction in case No. 13F6889 to a misdemeanor. The court granted the petition. In resentencing defendant, the court imposed the middle term of four years on the burglary count in case No. 09F5553 and credited defendant with time served on the misdemeanor possession conviction. Defendant timely appealed, claiming the court erred in resentencing him on burglary conviction.

DISCUSSION

Proposition 47 reclassified specified drug and theft offenses as misdemeanors and created a resentencing mechanism, codified at section 1170.18, under which eligible persons convicted of those offenses can petition the trial court to recall their sentences. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014, eff. Nov. 5, 2014; § 1170.18, subd. (a).) "Under no circumstances may resentencing under [section 1170.18] result in the imposition of a term longer than the original sentence." (§ 1170.18, subd. (e).)

Defendant contends the trial court's resentencing decision was unauthorized because the court had no jurisdiction to resentence him on felonies not enumerated in Proposition 47. He argues that while the court properly granted the petition as to his drug possession conviction (Health & Saf. Code, § 11350, subd. (a); Pen. Code, § 1170.18, subd. (a) [listing section 11350 as a qualifying offense]) and resentenced that count accordingly, the court improperly resentenced him to an increased term on his *concurrent* felony burglary conviction in a *different* case, which was not subject to Proposition 47. Citing subdivision (n) of section 1170.18, which provides "[n]othing in this section and related sections is intended to diminish or abrogate the finality of judgments in any case

not falling within the purview of this act[,]" he contends the court lacked authority to reopen sentencing in case No. 09F5553 because the judgment was final. We disagree.

We find *People v. Cortez* (2016) 3 Cal.App.5th 308 (*Cortez*) instructive. There, the court held that when a court recalls a felony sentence and imposes a misdemeanor sentence pursuant to section 1170.18, the court may revisit the sentence imposed on other misdemeanor counts, including those previously imposed *concurrently*, so long as the new aggregate sentence does not exceed the prior sentence. (*Id.* at p. 310.)

The defendant in *Cortez* pleaded guilty to one felony drug offense (count 1) and two misdemeanor drug offenses (counts 2 and 3), and was placed on probation. (*Cortez, supra,* 3 Cal.App.5th at p. 310.) The court later sentenced the defendant to 16 months in prison for the felony drug offense and a concurrent term of six months in jail on each of the two misdemeanor counts. (*Id.* at p. 311.) The defendant successfully petitioned to reduce his felony drug conviction to a misdemeanor under Proposition 47. (*Ibid.*) The court resentenced the defendant to 364 days in county jail on count 1, 129 days each on counts 2 and 3, with count 2 now running *consecutively* rather than *concurrently* as it had originally. (*Ibid.*)

The *Cortez* court rejected the defendant's arguments, similar to ones raised by defendant here, that the trial court lacked jurisdiction to resentence him on the two concurrent misdemeanor counts and had no authority to resentence one count consecutive to the redesignated count when it was originally sentenced concurrent. (*Cortez, supra,* 3 Cal.App.5th at p. 311.) The court determined that the trial court had *jurisdiction* to resentence the misdemeanor counts since a Proposition 47 petition reinvested the court with jurisdiction over the res of the action. (*Id.* at pp. 313-314, citing *People v. Vasquez* (2016) 247 Cal.App.4th 513, 518-519 ["Section 1170.18 provides a narrow exception to the general common law rule" that a court loses jurisdiction to resentence a criminal defendant once execution of the sentence has commenced].) It further concluded that the trial court had *authority* under section 1170.18 to revisit the entire sentence and not

merely the portion attributed to the qualifying felony. (*Id.* at pp. 315-316.) This included prior concurrent counts. (*Id.* at p. 316; see also *People v. Mendoza* (2016) 5 Cal.App.5th 535, 538-539 (*Mendoza*) [trial court had option of sentencing Case A anew after it reduced a felony conviction in Case B under Proposition 47; its options included changing a concurrent term to a consecutive term].)

It did not matter that the concurrent misdemeanor counts were not subject to the principal/subordinate scheme set forth in section 1170.1, subdivision (a) (*Cortez, supra,* 3 Cal.App.5th at pp. 316-317), which other opinions like *People v. Sellner* (2015) 240 Cal.App.4th 699 (*Sellner*) and *People v. Roach* (2016) 247 Cal.App.4th 178 (*Roach*) have cited as a basis for allowing courts to "reconsider all sentencing choices . . . because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components." (*Roach, supra,* 247 Cal.App.4th at p. 185 [defendant sentenced on four felony counts in three separate cases; his aggregate sentence included both consecutive and concurrent sentences]; *Sellner, supra,* 240 Cal.App.4th at pp. 701-702 [defendant sentenced on two counts in two separate cases; sentence included a principal and consecutive subordinate term].) According to the *Cortez* court, "the [trial] court is entitled to revisit sentencing decisions that have nothing to do with section 1170.1, subdivision (a)[,]" including "choos[ing] to run counts consecutively that were previously run concurrently." (*Cortez,* at p. 316.) This is because like sentences that run consecutively under section 1170.1, subdivision (a), the concurrent misdemeanor sentences were also "comprised of interdependent components designed to achieve the goals of sentencing based on the individual circumstances of the case." (*Id.* at p. 317.)

The court in *Cortez* explained that, "[t]he reason courts are entitled to revisit sentencing decisions beyond merely selecting a new principal term in accordance with section 1170.1, subdivision (a), is that the aggregate length of a term matters." (*Cortez, supra,* 3 Cal.App.5th at p. 316.) " 'A judge's subjective determination of the value of a case and the appropriate aggregate sentence, based on the judge's experiences with prior

cases and the record in the defendant's case, cannot be ignored. A judge's subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria.' " (*Id.* at p. 317.)

For the reasons articulated in *Cortez*, we hold that the court did not lack either jurisdiction or authority under section 1170.18, subdivision (a) to revisit its sentencing decision on the burglary conviction even though it originally ran the term concurrent to the felony drug possession conviction, which was later reduced to a misdemeanor. The court could increase the term on that count so long as the resentencing did not impose a term longer than the original sentence. (§ 1170.18, subd. (e).) Because defendant's original aggregate sentence was four years between the two counts, and upon resentencing the court imposed four years for the burglary and no additional time for the reduced misdemeanor, the court complied with the limitation in subdivision (e) of section 1170.18.

Nor are we persuaded that either *In re Reeves* (2005) 35 Cal.4th 765, 772 or *People v. Nunez* (2008) 167 Cal.App.4th 761, 765-766, which defendant cites for the proposition that concurrent terms retain their sentencing identities, put a concurrent term, which is a component part of an overall sentence under a plea agreement, beyond the court's reach in resentencing under Proposition 47. Both cases involved issues relating to the calculation of custody credits and not the scope of a court's authority under section 1170.18. (*People v. Taylor* (2010) 48 Cal.4th 574, 626 [an opinion is not authority for propositions not considered].)

Defendant's attempt to distinguish *People v. Bustamante* (1981) 30 Cal.3d 88 (*Bustamante*) also fails. Although it is true that the Supreme Court noted the trial court's jurisdiction to modify not only consecutive sentences but also concurrent sentences in the context of multiples convictions and sentences in a single case (*id.* at p. 93), the case

shows that concurrent sentences can be revisited under appropriate circumstances. (*Id.* at p. 104, fn. 12.)

In any event, *Roach* involved multiple convictions in separate cases and included both consecutive sentences in some cases and a concurrent sentence in another case. (*Roach, supra*, 247 Cal.App.4th at p. 182.) Under such circumstances, the court found the trial court properly revisited all sentencing choices, both consecutive and concurrent, when resentencing the defendant under Proposition 47. (*Id.* at p. 185; see also *Mendoza, supra,* 5 Cal.App.5th at pp. 537-539 [court did not err in changing concurrent term imposed in one case to a consecutive term after it granted a Proposition 47 petition in a second case that reduced a subordinate term to a misdemeanor].) Had the trial court been precluded from resentencing on the concurrent sentence in one of the cases after it reduced the principal felony term to a misdemeanor in another case, the trial court could not have chosen the offense originally sentenced concurrently to be designated the new principal term. (*Roach,* at pp. 182, 185.) Thus, the fact that defendant's felony convictions stemmed from two separate cases is not an impediment to resentencing him on one of the convictions even though that concurrent conviction is not eligible for reduction to a misdemeanor under Proposition 47.

We also reject the defendant's contention that the trial court somehow abused its authority "by believing that it was required to impose the sentence required by the plea agreement." The court's comments during the resentencing hearing regarding considerations that might influence the court's decision to impose a different sentence than the one to which the parties stipulated show the court did not believe it was "required" to impose the same overall sentence. The trial court, however, was well within its discretion to impose a term that was the same length as that originally bargained for by the parties. (*Roach, supra*, 247 Cal.App.4th at pp. 185-186 [nothing in section 1170.18 prohibits a trial court from imposing an aggregate term of the same length as the original term].)

Whether the People could have withdrawn from the plea deal following the court's reduction of the felony drug possession charge, an argument the People advance here but which the Supreme Court recently rejected in *Harris v. Superior Court* (2016) 1 Cal.5th 984 is beside the point. By reducing defendant's felony drug possession offense to a misdemeanor and resentencing him to time served, the parties' plea agreement incorporated the change in the law under Proposition 47. (*Doe v. Harris* (2013) 57 Cal.4th 64, 71 ["[T]he general rule in California is that plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy"].) This does not mean, however, that the court could not choose to increase the sentence on the burglary charge so long as the overall sentence did not run afoul of section 1170.18's prohibition against imposing an overall greater sentence than before. (§ 1170.18, subd. (e).)

DISPOSITION

The judgment is affirmed.

HULL, Acting P. J.

We concur:

ROBIE, J.

MURRAY, J.